IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

THURSDAY, THE 13TH DECEMBER 2007 / 22ND AGRAHAYANA 1929

W.P(C).No. 35610 of 2007(L)

PETITIONER:

GEORGE MUTHOLY,
PROPRIETOR NATIONAL TRADERS,
RUBBER TRADERS,
ELIKKULAM, KOTTAYAM.

BY ADV. SRI.BOBBY JOHN

RESPONDENTS:
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1. **THE ASSISTANT COMMISSIONER,**
   COMMERCIAL TAXES SPECIAL CIRCLE,
   KOTTAYAM.

2. **THE DEPUTY COMMISSIONER,**
   COMMERCIAL TAXES, KOTTAYAM.

3. **THE INTELLIGENCE OFFICER SQUAD NO.1,**
   COMMERCIAL TAXES, THALASSERY.

BY GOVT. PLEADER, SRI.GOVINDAN

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 06/12/2007, THE COURT ON 13/12/2007 DELIVERED THE FOLLOWING:

ANTONY DOMINIC, J.

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W.P.(C) No. 35610 OF 2007 L

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Dated this the December, 2007

J U D G M E N T

The prayer sought for in the writ petition is to quash Exts. P1 and P5 and to direct the 3rd respondent to grant sufficient opportunity to the petitioner to produce the relevant Form 25 declaration and to adduce evidence to prove that there was sales corresponding sales to the unaccounted purchase, before passing any order pursuant to Ext. P2.

2. Following Ext. P1 order of assessment for the year 2004-05, Ext. P2 notice under Section 45A of the KGST Act was issued to the petitioner giving him an opportunity of being heard against the proposal for imposition of penalty on the allegation that certain purchases were not accounted in the books of accounts for the year 2004-05. Though the petitioner submitted his reply by Ext. P3, Ext. P4 application under Section 35 of the KGST Act was made to the 2nd respondent requesting for reopening the assessment and that application was rejected by Ext. P5 informing the petitioner that if

he was aggrieved by the assessment order, he should file an appeal before the Deputy Commissioner (Appeals) Kollam. He was also informed that Section 35 of the KGST Act is not applicable in his case. It is challenging Ext. P5 and seeking the reliefs mentioned above that this writ petition is filed.

2. As far as the challenge against Ext. P5 is concerned, counsel for the petitioner submits that in view of the provisions contained in Section 35 of the KGST Act since vast powers are conferred on the 2nd respondent he is entitled to an order reopening the assessment. In order to canvass this position, learned counsel relied on the judgments of the Apex Court as also of this Court in The Board of Revenue, Madras v. Raj Brothers Agencies {XXXI (1973) STC 434}, Balachandran v. Sales Tax Officer {1987 (2) KLT 118} and Dy. Commissioner v. Balachandran {1988 (1) KLT 233}.

3. It is true that the position canvassed by the petitioner is supported by the aforesaid judgments relied on by the counsel for the petitioner. But, however, this submission overlooks the fact that subsequent to the aforesaid judgments were rendered, by Fianance Act, 1993, Section 35 of the KGST Act was amended and the power

under Section 35 is now confined to only those cases where the order passed or the proceedings recorded under the Act is in the opinion of the Deputy Commissioner prejudicial to the revenue. It is only in such cases can the Deputy Commissioner exercise the power under Section 35. In this case, it is the petitioner's own lapses that are now sought to be rectified by invoking the power under Section 35. In my view, this is not a case where Section 35 applies as the order cannot be said to be prejudicial to the revenue. Therefore, the rejection of Ext. P4 request made by the petitioner by Ext. P5 order cannot be faulted.

4. The petitioner also seeks to quash Ext. P1. If the petitioner is aggrieved by Ext. P1, since the statute provides remedies therefor, there is no question of quashing Ext. P1. Even otherwise, the fact that there are certain unaccounted sales as mentioned in Ext. P2, will not render Ext. P1 vulnerable in a proceeding under Article 276 of the Constitution of India. The other prayer made by the petitioner is to direct the 3rd respondent to grant sufficient opportunity to prove that there are corresponding sales to the unaccounted purchase before passing any order pursuant to Ext. P2

notice. Ext. P2 itself is a show cause notice giving the petitioner an opportunity to file his objections against the proposal for levy of penalty. This necessarily includes an opportunity to prove whatever the petitioner wants in defence of his conduct. I have no reason to think that an anticipatory direction should be issued to the respondents to afford the petitioner adequate opportunity to prove his innocence since such an opportunity is implicit in Ext. P2 itself. For all these reasons, I do not find any merit in this writ petition. The writ petition is only to be dismissed and I do so.

ANTONY DOMINIC
JUDGE

jan/-.